IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 4875 OF 2005

Mrs. Meharunnisa Mohammad Salim ...Applicant

Versus

State of Maharashtra ...Respondent

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Mr. R. Dholkia i/b Neeraj D. Gupta, Adv. for applicant.

Mr. A.P.Mundargi with Mr. C.K. Pendse, Advocate for Original accused Nos. 1 and 2.

Mr. Rajesh More, A.P.P. for State.

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CORAM: SMT. V.K. TAHILRAMANI, J.

DATED: 5TH OCTOBER, 2005

P. C.:-

1. Heard.

2. The applicant has filed complaint against Tajuddin Marodia and three others under Section 406, 420 r.w. 467, 468, 379, 380 r.w. 120-B, 34, 114 of I.P.C. The said complaint was filed before the learned Metropolitan Magistrate, 24th Court, Borivali, Mumbai. It was numbered as C.C. No. 81/M/2005.

3. In the said case, the complainant i.e. the present applicant has prayed that direction be issued

under Section 156(3) of Cr.P.C. to the police to investigate in the said case. The learned Magistrate came to be conclusion that the facts of the case do not warrant investigation under Section 156(3) of Cr.P.C., hence, the prayer for sending the complaint for investigation under Section 156(3) was rejected by the learned Magistrate by order dated 29.4.2005.

4. Being aggrieved thereby, the complainant preferred revision before the Sessions Court. By order dated 6.7.2005, the said revision came to be rejected by the learned Sessions Judge. Being aggrieved thereby, the present application has been preferred by the applicant.

5. It is submitted by the learned advocate for the applicant that the accused persons on the basis of fabricated and forged documents, transferred two flats of the complainant in the name of third party.

6. It is the case of the complainant that accused No.1 Tajoddin started construction of building by making an attempt to encroach upon the complainant’s land. The complainant filed a suit in the City Civil Court bearing No. 7167 of 1986. In the said suit the complainant and accused No.1 filed consent terms by which accused Nos. 1 and 2 had undertaken to give alternative accommodation to the complainant i.e.

flat Nos. 308 and 309 in Wing B of Radium Apartment, Goregaon (E). However, the accused No.1 failed to give possession of these two flats. The complainant filed suit No. 342 of 1996 for specific performance of consent terms. On 11.9.2000 accused No.1 put the complainant in possession of those two flats and since then the complainant is in possession of those two flats. After taking possession of the flats, the complainant went out of Mumbai. In August, 2003, the mother of the complainant who was residing in the said building informed the complainant that some unknown person entered into those flats and occupied the said flats. A complaint came to be lodged with the police. The complainant came to know from the police that the occupant of the flats had purchased the same under an agreement with the builder as per the consent terms filed by the complaint in Suit No. 342 of 1996. Under the consent terms the complainant was shown to have surrendered all her rights in respect of the said two flats. The said consent terms has been executed on the basis of Power of Attorney in favour of one Yashin Shaikh, in Suit No. 342 of 1996 in the High Court. The said Yashin Shaikh is admittedly the nephew of the complainant. The said Power of Attorney is dated 25.11.2002.

7. It is further the case of the complainant that on 25.11.2002 she was not in India and hence she could

not have executed the said power of attorney. Thus, it is the case of the complainant that the investigation under Section 156(3) of Cr.P.C. would be necessary to find out the truth as it is the case of the complainant that the accused on the basis of fabricated and forged documents transferred the two flats of the complainant in the name of third party. It may be stated here that the consent terms showed that instead of flat Nos. 308 and 309 the accused had agreed to provide flat No. 112 on the first floor in Wing B of Radium Apartment to the complainant.

8. In the present case, there is no question of recovery of any property or documents under Section 27 of the Evidence Act. All the documents relating to the Civil Suit are part of both the proceedings. It is the contention of the applicant that these documents can be collected by the police only during the course of investigation under Section 156(3) of Cr.P.C. As stated earlier all these documents specially the power of attorney is part of court proceedings. The court proceedings are available to the complainant and these documents can be produced in the Court as and when necessary. It is possible for the complainant to call such record from the Court with witness summons to produce the documents filed in the Civil Suit while recording evidence of

the witnesses in the present case. In the present case, there is no need to seize the said record as except with the permission of the Court the said record cannot be taken away by anyone including the parties to the said litigation. The applicant can make an application to the trial Court for calling the relevant documents of the proceedings pending in the Civil Court and for keeping these documents in the safe custody of the Court. Moreover, in the present case, the complainant is also aware of the person involved in the commission of the offence.

9. Section 156(3) Cr.P.C. can be resorted to when there is some investigation required which is of a nature that is not possible for the private complainant and which can only be done by the police upon whom the statue has conferred the powers essential for investigation. The trial court has placed reliance on the decision in the case of **Gulabchand Upadhayaya Vs. State of U.P. reported in 2002 Cri.L.J. 2907,** wherein it is observed that the direction under Section 156(3) of Cr.P.C. can be issued in the following case;-

i) where the full details of the accused are not known to the complainant and the same can be

determined only as a result of investigation, or

ii) where recovery of abducted person or stolen property is required to be made by conducting raids or searches of suspected places or persons, or

iii) where for the purpose of launching a successful prosecution of the accused evidence is required to be collected and preserved. To illustrate by example cases may be visualised where production before Court at the trial (a) sample or blood soaked soil is to be taken and kept sealed for fixing the place of incident; or (b) recovery of case property is to be made and kept sealed; or (c) recovery under Section 27 of the Evidence Act; or (d) preparation of inquest report; or (e) witnesses are not known and have to be found out or discovered through the process of investigation.

10. Of course these examples are not exhaustive and are only illustrative as has been observed in the very same decision. In the present case, it is seen that the full details of the accused are known to the complainant. There is no question of conducting any raids or recovery of any property or documents under Section 27 of Evidence Act. Moreover, there is no question of preserving the evidence. In such case, the learned Magistrate has rightly rejected the prayer for sending the complaint for investigation under Section 156(3) of Cr.P.C. So also looking to the facts of the case the revision has been rightly rejected by the learned Sessions Judge. No interference is called for. Application is rejected.

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